Supreme Court, U.S.
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No. 91-1919

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

RICHARD M. SOWERS,

Petitioner,

v.

FEDERAL EXPRESS CORPORATION,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

R. LARRY BROWN
CLIFFORD P. JOHNSON
Federal Express Corporation
2005 Corporate Avenue
Memphis, Tennessee 38132
(901) 395-3457

E. SCOTT SMITH
Counsel of Record
PAUL D. JONES
FORD & HARRISON
600 Peachtree at the Circle Building
1275 Peachtree Street, N.E.
Atlanta, Georgia 30309
(404) 888-3800

Attorneys for Federal Express Corporation

PRESS OF BYRON S. ADAMS, WASHINGTON, D.C. (202) 347-8203

COUNTERSTATEMENT OF THE QUESTIONS PRESENTED

1. Whether Petitioner's failure to assert, at any time before filing his Petition for Re-hearing with Suggestion for Rehearing En Banc in the Court of Appeals, that rejection of his common-law theory of anticipatory breach would be tantamount to a violation of Sections 2, Third, Fourth, and Ninth of the Railway Labor Act, 45 U.S.C. §§ 152, Third, Fourth, and Ninth, precludes consideration of that issue in this Court?

2. Whether the questions presented in the Petition are sufficiently grounded in the factual record to permit this Court any meaningful opportunity to review the ruling of the Court of Appeals?

3. Whether the Petition adequately presents any special and important reasons justifying this Court's exercise of discretionary review?

LIST OF PARTIES

The names of all parties to the proceedings in the United States Court of Appeals for the Ninth Circuit appear in the caption of the case in this Court.[1]

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[1] There are no parent companies or subsidiaries (except wholly owned subsidiaries) to be identified pursuant to Supreme Court Rule 29.1.

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IN THE

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RESPONDENT'S BRIEF IN OPPOSITION

Respondent Federal Express Corporation ("Federal Express") respectfully urges denial of the Petition for a Writ of Certiorari to review the judgment and order entered by the United States Court of Appeals for the Ninth Circuit on January 30, 1992.

JURISDICTION

The jurisdictional requisites are adequately set forth in the Petition.

STATUTES INVOLVED

No federal or state statute was involved in either the District Court or in Petitioner's appeal to the

Ninth Circuit. In this Court, however, Petitioner raises questions arising under Sections 2, Third, Fourth, and Ninth of the Railway Labor Act, as amended ("RLA"), 45 U.S.C. §§ 152, Third, Fourth, and Ninth. These provisions are set out at pp. 47-51 of the Petition.

COUNTERSTATEMENT OF FACTS AND PROCEEDINGS BELOW NECESSARY TO CORRECT INACCURACIES OR OMISSIONS IN THE PETITION

There is no record support whatsoever for Petitioner's suggestion that his "individual contract (the FCH) contained provisions for modification via a revision process [record citation omitted] wherein SOWERS was to be represented by a *revocable* agent [the FAB.]" (Petition, p. 10) (emphasis in original). The parties stipulated to the role played by the FAB in the FCH revision process (Petition, pp. 52-54), and no mention was ever made of Petitioner's alleged unilateral right to "revoke" the FAB's authority to appoint pilot members to FCH revision committees for the purpose of effecting binding modifications to the FCH agreement. The FAB's authority in that regard is conferred by the contract, not by Petitioner (*Id.*).

Likewise, the record does not support Petitioner's statement to this Court that the FAB is "an organization that was the child of Federal Express management and whose $1.1 million budget is paid completely by Federal Express . . . ." (Petition, p. 10). The record contains neither any allegation nor any evidence addressed to either point. The only evidence adduced below concerning either the origin, the nature, or the operation of the FAB was also the subject of a stipulation between the parties:

> There exists within Federal an elected organization known as the Flying [sic, Flight] Advisory Board (the "FAB"). The FAB is elected by the pilot group and is responsible for, among other things, dealing with management concerning matters of concern to crewmembers.

(Appendix B, p. 8a, ¶ 14). The record is silent as to both the FAB's creation and the amount and source of its budget.

The Petition misinforms this Court that Petitioner "properly terminated his revocable agency with the . . . FAB . . . ; this also being a stipulated fact between the parties." (Petition, p. 11). No such stipulation has ever existed. All matters stipulated to below were set forth in the Pretrial Order entered in the District Court (Appendix B, pp. 5a-11a), and they contain no suggestion that the FAB's authority to appoint revision committee members was either revocable or revoked. (See *Id.*, ¶¶ 1-3, 13-16, 20).

No pleading, motion, brief, or oral argument in the District Court ever raised any question arising under the RLA. (Appendix B, pp. 3a-14a). Nor was the RLA mentioned or considered in connection with any issue Petitioner presented for review by the Ninth Circuit (Appendix C, pp. 15a-16a, "A Statement of the Issues Presented for Review" from Petitioner's Opening Brief to the Ninth Circuit). Petitioner's first mention of the RLA came in his Petition for Re-Hearing with Suggestion for Re-Hearing En Banc, which he presented to the Ninth Circuit on or about February 14, 1992 (Appendix D, pp. 17a-18a). That petition was denied, apparently without any consideration being given to any issue said to arise under the RLA

(Petition, p. 40). Accordingly, neither the District Court nor the Ninth Circuit has considered or passed upon the RLA's applicability, if any, to the facts of this case.

SUMMARY OF ARGUMENT

What began and was decided below as a breach of contract action between parties of diverse citizenship (Petition, p. 15) is presented to this Court as raising far-reaching, if improbable, questions of federal labor policy under the RLA. To pose these questions that were neither raised nor decided below, Petitioner must either distort a detailed, stipulated factual record or create a new one as he goes along. His petition attempts to do both.

Petitioner's thesis turns on the proposition that the Federal Express Flight Advisory Board ("FAB") must be either one of only two things: (1) his "revocable agent," (Petition, pp. 10, 11), or (2) a carrier-dominated labor organization, the existence or maintenance of which violates the RLA. Petitioner's analysis ignores a third possibility: that the individual employment contract into which he entered with Federal Express itself invested the FAB with authority to bind Petitioner to contract modifications.

The record supports only this third alternative (Petition, pp. 52-54) and compelled the conclusion below that, "[a]ccording to its terms, the FCH [Flight Crewmembers Handbook] can only be modified pursuant to action of the FAB and Federal management .... The FAB-approved revision committee can bind

Sowers to FCH revisions." (Appendix A, p. 2a).[2] Accordingly, having stipulated to a record that defeats his breach of contract theory, Petitioner no longer complains of any conduct on the part of Federal Express. Instead, his new complaint is that, on his own appeal, the Ninth Circuit,

> exceeded its jurisdiction by essentially anointing this [now allegedly] employer-dominated 'quality circle' (the FAB) with all of the rights of an exclusive collective bargaining unit [sic, representative] under the Railway Labor Act but without any of the safeguards and responsibilities [required by the RLA.]

Petition, p. 23).

These "issues" formed no part of the case Petitioner alleged, tried, lost, and appealed below. No record exists by which this Court, or any other, could possibly adjudicate the FAB's alleged status as a carrier-dominated labor organization proscribed by the RLA. Such a finding, though, must precede consideration of Petitioner's present lament, that the "Ninth Circuit's . . . order . . . transmogrified this case from a simple contract action into a statutory quagmire . . . ." (Petition, p. 27 n. 5). This case was and remains "a simple contract action," and it properly presents no issue for resolution by this Court.

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[2] Appendix A is the Ninth Circuit's two-page Memorandum also set out at pp. 32-35 of the Petition. We include it here because the Petition's version inadvertently drops an important line from the penultimate paragraph of that court's decision.

REASONS FOR DENYING THE WRIT

I. Neither The Decision Below Nor The Record Raises Either Of The Questions Presented In The Petition.

Each Question Presented in the Petition (pp. 2-3) complains of an alleged disharmony between the lower courts' conclusions that Federal Express did not breach Petitioner's individual contract of employment, on the one hand, and various requirements of the Railway Labor Act, on the other. But the Ninth Circuit decided no such question in this proceeding. Moreover, the record will support no such determination of those issues by this Court.

Like the District Court's decision it affirmed (Petition, pp. 36-39), the Ninth Circuit's decision does no more than hold that Petitioner's "employment contract was not breached by repudiation or otherwise." (Appendix A, p. 2a). As Petitioner has always asserted, and continues to assert, the agreement giving rise to this dispute was "an individual contract of employment" (Petition, p. 10), not a collective bargaining agreement. Thus, the Ninth Circuit had no occasion to consider, and did not consider, any portion of the questions now presented in the Petition. This Court "ordinarily will not decide questions not raised or litigated in the lower courts." *City of Springfield v. Kibbe*, 480 U.S. 257, 259 (1987); *FTC v. Grolier, Inc.*, 462 U.S. 19, 23 n. 6 (1983). As *Kibbe* also states, "[t]hat rule has special force where the party seeking to argue the issue has failed to[raise or preserve it.]" 480 U.S. at 259.

If the writ requested were granted to review the Questions Presented by Petitioner, it would be dismissed as improvidently granted after plenary con-

sideration. *Belcher v. Stengel*, 429 U.S. 118 (1976) (*per curiam*). The linchpin of each of the Questions Presented is the allegation that the FAB is a "carrier-dominated labor organization" maintained in violation of the RLA. But because that assertion lacks any record support whatsoever, the Petition should be denied now, rather than the writ dismissed later. *See EEOC v. FLRA*, 476 U.S. 19, 23 (1986).

Petitioner's Questions Presented assume that the FAB is a carrier-dominated labor organization, but this contention was neither raised nor proved below. That assumption is itself composed of two parts: that the FAB is a "labor organization" and, if it is, that Federal Express "dominates" it.

The RLA treats the subject of "carrier domination" in Section 2, Fourth. That section states, in relevant part, that:

> [I]t shall be unlawful for any carrier to interfere in any way with the organization of its employees, or to use the funds of the carrier in maintaining or assisting or contributing to any labor organization, labor representative, or other agency of collective bargaining, or in performing any work therefor,. . . .

45 U.S.C. § 152, Fourth. That section's proscriptions are tied to Congress's concern with eliminating a carrier's "actual interference with the liberty of [its] employees in the selection of their representatives[,]" *Texas & N.O. Ry. Co. v. Brotherhood of Ry. & S.S. Clerks*, 281 U.S. 548, 560 (1930), a concern that has never been implicated in this case.

Safeguards against improper carrier or employer influence over labor organizations are neither new nor arcane. Federal labor policy, as applied by this Court and the courts of appeal, has protected employee rights in this area for over fifty years. *See, e.g.*, Sections 2, Third, and Fourth of the Railway Labor Act, 45 U.S.C. §§ 152, Third, Fourth; Section 8(a)(2) of the National Labor Relations Act ("NLRA"), 29 U.S.C. § 158(a)(2); Section 302(a) of the Labor Management Relations Act, 29 U.S.C. § 186(a); and *NLRB v. Cabot Carbon Co.*, 360 U.S. 203 (1959). These concerns are not unknown to the circuit courts and are fully considered when presented in appropriate cases. *See, e.g.*: *Barthelemy v. Air Line Pilots Ass'n*, 897 F.2d 999, 1014-1017 (9th Cir. 1990) (carrier did not violate RLA Section 2, Fourth by assuming labor organization's $1.25 million investment-banking expense); *Hertzka & Knowles v. NLRB*, 503 F.2d 625 (9th Cir. 1974), *cert. denied*, 423 U.S. 875 (1975) (no violation of Section 8(a)(2) of NLRA where cooperative employee-management arrangement reflects employee free choice and not management instigation and coercion); *Brotherhood of Ry. & S.S. Clerks v. Virginian Ry. Co.*, 125 F.2d 853, 858-59 (4th Cir. 1942) (describing indicia of carrier domination of labor organization in violation of RLA).

But the "appropriate cases" are those which present factual records upon which the courts can answer two questions: (1) the origin and operation of the employee group in question, *i.e.*, is the group actually a "labor organization" under the relevant statute? and (2) the nature and extent of carrier or employer control, interference, assistance, or influence, *i.e.*, is

the "labor organization" "carrier-dominated?" The record in this case answers neither question.

The only evidence before the District Court and Ninth Circuit concerning the origin and nature of the FAB is found in the parties' one-sentence stipulation describing the FAB as ". . . elected by the pilot group and . . . responsible for, among other things, dealing with management concerning matters of concern to crewmembers." (Appendix B, p. 8a, ¶ 14). What this Court can know about the FAB's function is limited to the single fact that the FAB appoints three of the seven members of FCH Revision Committees for purposes of considering modifications to the FCH contract. (Petition, p. 52). This meager record provides no basis for a determination that the FAB is a "labor organization" under the RLA.

Even less supported is the second prong of the determination Petitioner asks this Court to make. The record contains no evidence whatsoever that Federal Express created, influenced, controlled, or financially assisted the FAB in any way. Petitioner merely asks this Court to accept on faith his suggestion that the FAB is "an organization that was the child of Federal Express and whose $1.1 million budget is paid completely by Federal Express . . . ." (Petition, p. 10). Petitioner did not allege or prove one word of that statement below (Appendix B, pp. 3a-14a), and he cannot properly ask this Court to be the initial arbiter of such significant contentions of fact.

Nowhere present in the record made below are any of the allegations, facts, or findings that must necessarily precede consideration of the Questions Presented in the Petition. The Petition seeks an advisory opinion upon a hypothetical set of assumptions that

has never before been alleged or proved. There is, simply, nothing for this Court to review, and, for this reason alone, the Petition should be denied.

II. The Questions Presented Are Important Only To The Parties, Reflect No Circuit Conflict, And Present No Significant Legal Matter Warranting Resolution By This Court.

Aware that the decisions below that Federal Express did not breach his individual, common-law, employment contract affect only the parties to this case and create no circuit conflict, Petitioner strains to suggest that he raises a question "the national significance and importance of [which . . .] is just currently coming into focus." (Petition, p. 28). He does not explain how this can be so, given the age of the "employer domination" cases, and the asserted "significance" of the issue he raises is all the more reason for this Court not to consider the question on the hypothetical record Petitioner presents. *Mishkin v. New York*, 383 U.S. 502, 512-13 (1966) (writ dismissed as improvidently granted where "far-reaching and important questions tendered . . . are not presented by the record with sufficient clarity to require or justify their decision.")

Petitioner points to two cases now pending before the National Labor Relations Board and the National Mediation Board in which the legality of "quality circles" or "employee involvement programs" is being tested under the NLRA and the RLA.[3] His reliance on these pending cases proves too much.

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[3] One of the pending cases, *Electromation, Inc. & Int'l. Bhd. of Teamsters*, NLRB Case No. 25-CA-19818 ALJ Dec'n (1990), has provoked some recent commentary among members of the

Petitioner himself notes that, in *Electromation*, an administrative law judge "has made findings of fact and conclusions of law that would indicate a 'quality circle' or 'action committee' . . . are [sic] inimical to the ability of labor to organize." (Petition, p. 29). If the agencies charged with administering the NLRA and RLA should determine that "quality circles" are inimical to federal labor policy, the federal courts will have ample opportunity to review those conclusions on properly-developed records. It is precisely the absence of any similar record here that makes this case especially inappropriate for review by this Court.

This case, therefore, presents no significant federal question or other legal matter warranting resolution by this Court. The decision below rests entirely upon the adequate, independent, common-law ground that Petitioner's individual contract of employment "was not breached by repudiation or otherwise." (Appendix A, p. 2a). Because nothing else, or greater, can properly be made of this case, this Court should decline Petitioner's invitation to consider the questions he presents.

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labor-law bar. *Compare*, Bennet D. Zurofsky, "Everything Old Is New Again: Company Unions in the Era of Employee Involvement Programs," 8 *Lab. Law.* (ABA) 381 (1992), *with*, Melvin Hutson, "*Electromation*: Employee Involvement or Employer Domination," 8 *Lab. Law.* (ABA) 389 (1992).

CONCLUSION

For the foregoing reasons, the Petitioner for a Writ of Certiorari should be denied.

Respectfully submitted,

R. LARRY BROWN
CLIFFORD P. JOHNSON
Federal Express Corporation
2005 Corporate Avenue
Memphis, Tennessee 38132
(901) 395-3457

E. SCOTT SMITH
Counsel of Record
PAUL D. JONES
FORD & HARRISON
600 Peachtree at the Circle Building
1275 Peachtree Street, N.E.
Atlanta, Georgia 30309
(404) 888-3800

Attorneys for Federal Express Corporation

APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 90-16752

D.C. No. CV-89-00474-BRT

RICHARD M. SOWERS,
Plaintiff-Appellant,

v.

FEDERAL EXPRESS CORPORATION,
Defendant-Appellee.

Appeal from the United States District Court for the District of Nevada
Bruce R. Thompson, Senior District Judge, Presiding

Argued and Submitted January 13, 1992
San Francisco, California

MEMORANDUM*

Before: SNEED, SCHROEDER, T.G. NELSON, Circuit Judges.

Richard Sowers appeals the district court's grant of summary judgment in favor of Federal Express Corporation ("Federal"). We review *de novo*, *Kruso v. Inter-*

*This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 36-3.

national Tel. & Tel. Corp., 872 F.2d 1416, 1421 (9th Cir. 1989), *cert. denied*, 110 S. Ct. 3217 (1990), and affirm.

We may affirm on any ground finding support in the record. *Id.* Sowers' employment contract was not breached by repudiation or otherwise. The FCH was at all times amendable, according to its terms, with or without Sowers' individual consent. The revision process concluded on August 4, 1989, in a FAB-approved revision which complied with the FCH revision process. The district court correctly concluded that Federal properly revised Section 1-96 of the FCH before performance was due, and that Sowers' anticipatory breach theory was no more than a fiction.

Furthermore, as the district court explained, Sowers failed to treat the alleged repudiation as a breach by resigning his employment or otherwise putting Federal on notice that he considered his employment contract to be terminated. The filing of lawsuits by Sowers did nothing to affect his employment contract. We reject Sowers' argument that by continuing his employment with Federal he was merely mitigating his damages. Sowers' arguments are an ad hoc explanation of a series of events which in reality do not support his position.

Sowers would have us believe that because he "fired" the FAB, the modification of the FCH was invalid as to him. According to its terms, the FCH can only be modified pursuant to action of the FAB and Federal management. Sowers notified FAB that he had "terminated his agency with them." Sowers removed himself from the amendment process; this did not affect the process or the resulting modification. The FAB-approved revision committee can bind Sowers to FCH revisions.

We have considered the other contentions of the parties and conclude that no additional discussion is necessary. The district court's entry of summary judgment is AFFIRMED.

APPENDIX B

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

Case No. CV-N-89-403 BRT

RICHARD M. SOWERS,

Plaintiff,

vs.

FEDERAL EXPRESS CORPORATION;
TIGER INTERNATIONAL, INC.;
THE FLYING TIGER LINE INC.,
a wholly owned subsidiary of TIGER INTERNATIONAL, INC.;

Defendants.

Case No. CV-N-89-474 BRT

RICHARD M. SOWERS,

Plaintiff,

vs.

FEDERAL EXPRESS CORPORATION,

Defendant.

PRETRIAL ORDER

Following pretrial proceedings in this cause pursuant to Local Rule 190-3, IT IS ORDERED:

I.

These Cases are actions for injunctive relief and damages sought to remedy Defendant's alleged breach of its

employment contract with Plaintiff, material portions of which are embodied in the Federal Express Flight Crewmembers Handbook ("FCH"). The alleged breach arose out of Defendant Federal Express Corporation's ("Federal") merger with Tiger International, Inc. and its wholly-owned subsidiary, The Flying Tiger Line, Inc. ("Tiger"), on August 7, 1989. On December 16, 1988, as part of its Agreement and Plan of Merger with Tiger International, Inc., Federal voluntarily adopted certain Labor Protective Provisions ("LPPs"). The LPPs require the fair and equitable integration of the seniority lists of the two pilot groups and provide that Federal must arbitrate any challenge to the fairness or equity of that integration. Following that merger, Federal is proceeding with the fair and equitable combination of the former Federal pilot seniority list and the former Tiger pilot seniority list into a single, integrated seniority list.

Plaintiff contends that when, on or about December 16, 1988, Defendant FEDERAL EXPRESS CORPORATION voluntarily entered into Labor Protective Provisions (LPPs) and did other acts as a part of their merger agreement with TIGER INTERNATIONAL/FLYING TIGERS, they did so knowingly and willfully violating a pre-existing individual contractual right contained in the aforementioned 1-96 of the FCH. FEDERAL EXPRESS entered into these LPPs for economic gain in violation of a pre-existing contractual right.

These actions by FEDERAL EXPRESS inevitably caused the loss of 600 to 800 seniority positions for Plaintiff SWOERS [sic] and drastically effected his future earnings, retirement benefits and job satisfaction.

Plaintiff seeks compensation sufficient to protect his expectancy in interest in the underlying contract of employment as partially expressed by 1-96 of the FCH.

Federal contends that Section 1-96 of the FCH was at all times amendable; that the FCH was properly amended.

according to its terms, before the merger of Tiger into Federal; that the contract has not been breached; and that Plaintiff is not entitled to any relief whatsoever. Alternatively, Defendant contends that Plaintiff had knowledge of Federal's intention to comply with the LPPs from on or about December 16, 1988, and knew that such compliance would be inconsistent with his alleged right under FCH Section 1-96; that Plaintiff first informed Federal of his objection to Federal's announced course of action on or about July 14, 1989, three days before he filed the first of these suits against Federal; that between December 1988 and July 1989 Plaintiff knew that Federal was expending great sums of money and amounts of time preparing to comply with the LLPs [sic, LPPs] and that much of that time and money was expended on behalf of Plaintiff and the other Federal pilots; that Federal reasonably construed Plaintiff's silence as his acquiescence to Federal's frequently-announced intentions to comply with the LPPs; and that Plaintiff's conduct amounts to laches and equitably estops him from recovering any damages or other relief from Federal.

II.

This Court has diversity jurisdiction over the subject matter of this action under 28 U.S.C. § 1332(a)(1). Plaintiff is a citizen and resident of the State of Nevada; Federal is a Delaware corporation with its principal place of business in Memphis, Tennessee; and the amount in controversy between the parties exceeds the sum or value of $50,000.00, exclusive of interest and costs.

III.

The following facts are admitted by the parties and require no proof:

1. On July 17, 1989, the Plaintiff filed his initial complaint in the action styled as *Richard Sowers v. Federal*

Express Corporation, Tiger International, Inc. and Flying Tiger Line, Inc., CV-N-89-403-BRT (D. Nev.), claiming that the seniority he had earned while working as a pilot for Federal was being jeopardized by the merger of Flying Tigers and its pilot workforce into Federal Express.

2. According to the Plaintiff, Federal was threatening to integrate the seniority lists of the two carriers in a "fair and equitable manner," in contravention of his contractual right to insist on having all Flying Tigers' flight crewmembers placed at the bottom of any integrated seniority list.

3. The Plaintiff requested injunctive relief as well as $2.5 million in compensatory damages, $5 million for mental distress and an unspecified amount for general damages, punitive damages, actual, consequential and incidental losses and attorneys' fees and prejudgment interest.

4. Plaintiff alleges and Federal agrees that, Plaintiff has an individual contract of employment with Federal, the material terms and conditions of which are governed by the FCH.

5. Section 1-96, added to the FCH in August, 1988, provided:

> In the event the Company acquires or merges with another airline employing Flight Crewmembers, any such crewmembers selected for retention will be awarded seniority in accordance with FCH 1-85, Crewmembers Seniority, with the exception of FCH 1-88 [relating to the relative seniority of crewmembers hired on the same date].

6. Section 1-86 of the FCH stated that:

> Seniority will begin to accrue on the date a pilot is employed by the Company as a crewmember and begins Initial Training and Basic Indoctrination. It will continue to accrue during his entire

> employment period, except as specified in FCH Sections 1-88 and 1-91 [relating to crewmembers assigned to non-flying duty].

7. The FCH contains an internal dispute resolution procedure known as the Guarantee of Fair Treatment Policy ("GFTP") which, had it been invoked in this case, could have resulted in Plaintiff's complaint being finally resolved by a Board of Review consisting of five Federal pilots, three of whom would have been chosen by Plaintiff. Seniority grievances are expressly redressable by the GFTP. Plaintiff was aware of the GFTP procedures and had previously invoked those procedures to resolve an earlier grievance, but he made no attempt to do so in this case.

8. On December 16, 1988, Federal and Tiger International entered into an Agreement and Plan of Merger. As part of that Agreement, Federal agreed to adopt labor protective provisions no less favorable to employees of both carriers than those imposed by the Civil Aeronautics Board in the *Allegheny-Mohawk Merger Case*, 59 C.A.B. 19 (1972).

9. In accordance with that obligation, Federal voluntarily assumed the Federal Express-Flying Tigers Labor Protective Provisions (the "LPPs").

10. Section 3 of the LPPS specifies that:

> Insofar as the merger affects the seniority rights of the carriers' employees, provisions shall be made for the integration of seniority lists in a fair and equitable manner, including, where applicable, agreement through collective bargaining between the carriers and the representative of the employees affected. In the event of failure to agree, the dispute may be submitted by either party for adjustment in accordance with Section 13 [providing for final and binding arbitration before a neutral arbitrator selected by the parties].

12. In December, 1988, The Flying Tiger Line, Inc. was a party to a collective bargaining agreement with the Air Line Pilots Association, International, which agreement governed the rules, working conditions, and rates of pay of the Flying Tiger pilots. That agreement required, *inter alia*, that:

> In the event of a consolidation or merger of the business of the Company [Flying Tiger], with the business of another air carrier, the Company, if it is the surviving air carrier, will provide the pre-merger or pre-consolidation Company pilots covered by this Agreement with the labor protective provisions specified by the Civil Aeronautics Board in the Allegheny-Mohawk merger (the "Labor Protective Provisions"). If the Company is not the surviving air carrier the Company shall use its best efforts to cause the surviving air carrier to provide the pre-merger or pre-consolidation Company pilots with the Labor Protective Provisions. . . .

13. At no time prior to three days before he filed his original lawsuit did Richard Sowers tell Federal that he objected to Federal's adoption of the LPPs.

14. There exists within Federal an elected organization known as the Flying [sic, Flight] Advisory Board (the "FAB"). The FAB is elected by the pilot group and is responsible for, among other things, dealing with management concerning matters of concern to crewmembers.

15. The FCH contains a Revision Process, which is administered by a Revision Committee consisting of three (3) pilots appointed by the FAB, three (3) management members appointed by the System Chief Pilot, and the System Chief Pilot. Two basic methods are specified in the FCH by which a modification to the terms of the FCH can be effectuated. Under the formal Revision Process, the Revision Committee meets to consider changes that

have been proposed. A quorum of five of the six crewmembers, plus the Chief Pilot, is required to conduct the revision process. All crewmembers are thereafter notified of the proposed changes and have three (3) weeks to submit comments to the Revision Committee. After receiving those comments, the Revision Committee determines whether to recommend the changes to the FCH, and any recommended revisions are sent to the Senior Vice President of Air Operations who decides whether to accept the recommended revision. Any member of the Revision Committee can appeal the decision of the Senior Vice President of Air Operations to the Chief Operating officer who, along with the Chairman and Chief Executive Officer, will render the final opinion regarding the proposed revision.

16. The other means for revising the FCH is the Bulletin Process. A Notice of Exception Bulletin is used to permit exceptions to the normal FCH procedures to be made for single instances where appropriate. At least six (6) of the seven (7) Revision Committee members must endorse the proposed exception in order for it to be sent to the Senior Vice President of Air Operations for approval. The determination of the Senior Vice President of Air Operations to accept or reject the exception can be appealed by any member of the Revision Committee to the Chief Operating Officer who, acting in conjunction with the Chairman and Chief Executive Officer, will render the final opinion regarding the proposed exception.

17. On July 15, 1989, T. Allen McArtor, the Senior Vice President for Air Operations at Federal, sent a memorandum to David Sanders, the Chairman of the FAB, and to the other members of the Revision Committee, notifying them of a proposed revision to Section 1-96 of the FCH.

18. Instead of designating the three (3) pilot members to serve on the Revision Committee from the FAB, Sanders sent a memorandum to McArtor, advising him that the FAB refused, at that time, to participate in any man-

ner in a Revision Committee that was considering revising Section 1-96 of the FCH.

19. Managements' Revision Committee Members, acting in the absence of the pilot members from the FAB, thereafter convened and a proposed revision to Section 1-96 was then sent to all crewmembers for their consideration and comments.

20. The Plaintiff then filed his second Complaint, styled as *Richard Sowers v. Federal Express Corporation*, CV-N-89-474-BRT (D. Nev.), contending that the Revision Committee could not adopt a change to the FCH in the absence of the FAB-appointed pilot-committee members. Based on this alleged breach of his contract, the Plaintiff sought $2.5 million in compensatory damages, $5 million for anxiety, mental stress, humiliation and despair, injunctive relief to prevent any revision to the FCH, unless accomplished in accordance with the Revision Process, and his attorneys' fees.

21. At the request of the FAB, the entire Revision Committee, including all FAB-appointed Committeemen, met on August 4, 1989. The Revision Committee agreed to withdraw the proposed revision published for comment on July 15th, and, instead, unanimously approved a Bulletin exception to Section 1-96 of the FCH.

22. Under the terms of that exception, Bulletin 89-25, Section 1-96 is to remain unchanged except that integration of the seniority lists of the Federal and the Flying Tigers flight crewmembers is to be accomplished in a fair and equitable manner in accordance with Sections 3 and 13 of the LPPs. Bulletin 89-25 also requires that, until the integration process has been completed, the pilots of both carriers retain their previous seniority rights, and they are restricted from bidding on one another's aircraft and routes.

23. In conformity with the Bulletin Exception process, Bulletin 89-25 as proposed by the full Revision Committee

was approved by the Senior Vice President of Air Operations on August 4, 1989, before the merger of Flying Tigers into Federal occurred on August 7. At all times since then, Federal has complied with the terms of Bulletin 89-25, and the integration of the seniority lists of the Flying Tigers and the Federal pilots is being resolved by an impartial arbitrator selected by the parties who began hearings on December 7, 1989. To date, Plaintiff has not asserted or complained of any violation of Section 1-96 of the FCH, as modified by Bulletin 89-25.

24. As of the date of this Pretrial Order, Plaintiff has suffered no economic loss whatsoever as a result of the addition of Bulletin 89-25 to the FCH as an exception to the operations of Section 1-96 of the FCH.

25. The offer and acceptance of employment were made while Plaintiff was a resident of Sacramento, California, telephonically and in writing. Subsequently, the FCH was delivered to Plaintiff during his initial training in Memphis, Tennessee.

26. FRED SMITH is the Chief Executive Officer of the FEDERAL EXPRESS CORPORATION.

27. The facts stated above in II regarding jurisdiction.

IV.

The following facts, though not admitted, will not be contested at trial by evidence to the contrary: None.

V.

The following are the issues of fact to be tried and determined at trial:[1]

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[1] Defendant submits that there is no genuine issue of material fact as to Defendant's liability in these cases and, therefore, that there is nothing for a jury to determine. Accordingly, Defendant will move for summary judgment, as to the entirety of both of Plaintiff's complaints, and will serve such motion on or before May 4, 1990.

1. Where is the place of performance of the contract of employment between Plaintiff and Federal?

2. What State has the most significant interest in contacts with the contract of employment between Plaintiff and Federal?

3. Whether or not a breach of the covenant of good faith and fair dealing occurred when Defendant FEDERAL EXPRESS CORPORATION entered into the LPPs, on or about December 16, 1988, with knowledge of the underlying and pre-existing individual contractual rights of Plaintiff, as expressed in 1-96 of the FCH.[2]

4. Did Plaintiff unreasonably delay his claim of breach of his contract of employment with Federal?

5. Did Federal change its position or suffer injury or disadvantage during or as a result of Plaintiff's delay in asserting his said claim?

VI.

The following are the issues of law to be tried and determined upon trial or to be earlier disposed of by motion:

1. Whether the FAB-approved insertion of Bulletin 89-25 into the FCH as an exception to FCH Section 1-96 amounted to a breach of contract?

2. Upon the issue of liability, may the Court properly consider events occurring after the filing of this action but before the merger of Flying Tigers into Federal?

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[2] As noted *infra* in the issues of law, Federal objects to consideration of any issue relating to the covenant of good faith and fair dealing because it has not been pleaded by Plaintiff. Federal further objects to the phrase "pre-existing individual contractual rights" because it implies the FCH "contract" could not be changed in accordance with its terms.

3. Whether Plaintiff's claims for injunctive relief should be dismissed for Plaintiff's failure to join indispensable parties?

4. Whether Plaintiff's claims are barred by Plaintiff's admitted failure to exhaust the contractual remedy of processing a claim under the Guarantee of Fair Treatment Policy contained in the FCH?

5. Whether Plaintiff's claims are barred by laches?

6. Whether Plaintiff is estopped from asserting his claims?

7. Whether Plaintiff has an adequate remedy at law so that he is not entitled to injunctive relief?

8. Whether Plaintiff has properly pleaded a claim for breach of the implied covenant of good faith and fair dealing?

9. Whether Plaintiff is entitled to punitive damages?

10. Whether or not Paragraph 1-96 of the FCH was a pre-existing individual contractual right between Plaintiff and Defendant FEDERAL EXPRESS.

11. Whether or not FEDERAL EXPRESS anticipatorially [sic] breached the aforementioned individual contract of employment when they voluntarily entered into the LPPs with TIGER INTERNATIONAL/FLYING TIGER LINE, INC. on or about December 16, 1988.

12. If this was a [sic] anticipatory breach of Plaintiff's contract of employment as expressed in 1-96 of the FCH, did this breach cause damages to Plaintiff on August 2, 1989, when the instant lawsuit was filed.

13. Whether or not the revisions of the FCH made prior to August 2, 1989, mitigated/negated the

contractual rights of Plaintiff as expressed in Paragraph 1-96 of the FCH.

14. Whether or not any modifications to the FCH, Section 1-96, made after the filing of the instant lawsuit on August 2, 1989 serve to mitigate/negate Plaintiff's damages, if any.

15. The issues of declaratory relief; the Court determining the rights of the parties concerning the provisions of the FCH (individual contract of employment between Plaintiff (employee) and Defendant (employer) vis-a-vis the LPPs which are contrary to the contract of employment entered into between Defendant FEDERAL EXPRESS and TIGER INTERNATIONAL, INC./THE FLYING TIGER LINE, INC.

APPENDIX C

BRIEF OF APPELLANT

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

APPEAL NO. 90-14752

RICHARD M. SOWERS,
Plaintiff/Appellant,

v.

FEDERAL EXPRESS CORPORATION,
Defendant/Appellee.

APPEAL FROM JUDGMENT OF DISTRICT COURT

I. A STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

1. Did the Trial Court err in ruling that SOWERS' individual contract of employment was not terminated by FEDERAL EXPRESS' ("FEDERAL") anticipatory breach and SOWERS' subsequent lawsuit?

2. Did the Trial Court err in ruling that FEDERAL'S attempted modification of the Flight Crewmembers' Handbook ("FCH") (which was agreed to by the Flight Advisory Board ("FAB") and FEDERAL management *after* the filing of this lawsuit, but never agreed to by SOWERS or any agent authorized by him) severed the legal remedies available to SOWERS?

3. Did the Trial Court err in ruling that SOWERS' continued employment by FEDERAL following the filing of this lawsuit was a waiver by him of legal remedies oth-

erwise available to him; rather than merely a reasonable and good faith attempt to mitigate his damages?

APPENDIX D

BRIEF FOR APPELLANT

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

APPEAL NO. 90-14752

RICHARD M. SOWERS,
Plaintiff/Appellant,

v.

FEDERAL EXPRESS CORPORATION,
Defendant/Appellee.

APPEAL FROM JUDGMENT OF DISTRICT COURT

PETITION FOR RE-HEARING WITH SUGGESTION FOR RE-HEARING EN BANC

I. STATEMENT OF THE REASONS FOR FILING THE MOTION FOR RE-HEARING WITH SUGGESTION FOR RE-HEARING EN BANC

A. Reasons for Request for Re-Hearing

A material point of fact or law was overlooked/misapprended in the decision.

B. Reasons for Suggesting a Re-Hearing En Banc

The instant proceeding before this Court involves a question of exceptional importance going directly to the use of employer-sponsored, employee "quality circle", committees, unions, etc., such as the Flight Advisory Board (FAB)

that violate either the NLRA (29 USC 151, et seq.) or the RLA (45 USC 151-180) provisions and (in this case) strip SOWERS of *all* individual contract rights.